UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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H. CHRISTINA CHEN-OSTER, et al.,

Defendants,

v. 10 CV 6950 (LBS)

GOLDMAN SACHS & CO., et al.,

Defendants.

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New York, N.Y.
December 21, 2011
10:00 a.m.

Before:

HON. LEONARD B. SAND,

District Judge

APPEARANCES

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(Case called)

(In open court)

THE COURT: I will hear from the movant. Let me tell you that there is a factual issue which I would like the parties to address. The defendants state that the EEOC investigation was limited to the department in which Chen-Oster was employed, and they didn't investigate anything else.

The plaintiffs state that, pursuant to Chen-Oster's request, the investigation conducted by the EEOC extended beyond Chen-Oster's area of employment, and the documents were furnished to the defendants. I am looking at page 3 of the plaintiff's memorandum in response.

Who's right? Are we going to have an argument over --

MS. BROWN: Your Honor, may it please the Court, I believe there is no question that the investigation was confined to those three groups. If I may, anticipating this question, I have pulled out the relevant documents.

THE COURT: Yes.

MS. BROWN: May I hand those up to the Court and counsel?

If you look at tab 3, your Honor, which is the tab that has to do with this issue --

THE COURT: Tab 3?

MS. BROWN: Tab 3. It's getting to the back of the book. The Dukes argument is up front there. But we will get

to that later. If you look at tab 3, starting with the charge itself, and here we have her charge under 3A, as you can, see she talks about working as a convertible bond --

THE COURT: I know what the initial charge was.

MS. BROWN: All right.

THE COURT: There is language that each side can quote.

MS. BROWN: Then if you look at tab D.

THE COURT: Tab?

MS. BROWN: D.

THE COURT: Tab?

MS. BROWN: 3D. It is a letter to Mr. Rogers from the EEOC.

THE COURT: Yes.

MS. BROWN: You see the first part there they are asking just how data is kept. But if you look at what they are actually asking for on the third page of this letter, they are talking only about the groups at the bottom of the page, the number of employees in research shares, convertible sales, derivative sales.

The next page, No. 9, convertible bonds; No. 13, convertible bonds; No. 14, synthetic convertibles, which was a group she was in for about a year or so after convertible bonds.

No. 15 on the next page, convertible bonds; 16,

convertible bonds, and so forth. That is all that is asked for. All these personnel files that are asked for are people in convertible bonds.

THE COURT: Bear with me a moment. I am looking at page 3 of the plaintiffs' memorandum.

MS. BROWN: Let me look at that.

Well, your Honor, the items that are listed at the bottom of page 3 --

THE COURT: Yes.

MS. BROWN: -- are what I would call classic items that are asked for by the EEOC even in individual cases. They want to know if an employer has complaints of harassment and so forth.

The March 2007, if you look back it's at tab C here, I believe -- let's see where it is. It was followed up with an e-mail that says very clearly that what they are referring to here is employees who work in convertible bonds only. Then, No. 3, they talk about the June 2008 letter, your Honor.

THE COURT: Yes.

MS. BROWN: Let's look at that. The March 2007 letter is tab E.

THE COURT: Yes.

MS. BROWN: Then if you look under tab F, the spreadsheet that's referenced in tab E on the second page says, "I have attached a spreadsheet with names of and basic

information concerning women who were employed by GS in its convertibles group in either London or the U.S."

That is the reference that they always come back to and that she always was referring to in her communications with the agency.

Then the third item that they reference -- I don't mean to rush you, your Honor -- the June 2008 letter that they refer to on page 3.

THE COURT: Yes.

MS. BROWN: That's right behind tab G. Look there. She talks under No. 1 about people in the convertible bond sales group. If you turn over to the next page she says herself, "We should define my peers as all convertible salespeople both in London as well as in the U.S. for years '97 to 2005."

She herself defined the group as no broader than convertible sales. The most that the EEOC ever asked about was that group and then the group that she was going to join before she quit, research sales.

But there is nothing broader here. On the third page of this June 2008 letter, where she talks about a list of similarly situated employees, which is the line in the charge that they are trying to hold all of this together with, the list was all people in convertible sales.

Then the EEOC's follow-up behind tab H is looking at

seating charts for the convertible bond sales group.

So that was the focus of everything. The other sort of background information or information that might pertain to her individual claim of harassment never ever went broader than those groups.

I would also add, your Honor, the plaintiffs never answered this argument in any briefing that we did, and the reason is because they can't.

THE COURT: Well, they are answering in this memorandum, right?

MS. BROWN: They didn't answer it in the memorandum with respect to these groups. What they are saying is that the line means something more than her individually.

But the reality is the documents that they have cited here, which are a tiny bit, these do not give a sense of what the EEOC was really asking Goldman Sachs for over the years. The ones I have given you are the ones that they were pursuing. As you can see, the harassment one pertains to her individual claim. Similarly situated by that definition would be people who have been assaulted and believe they had been retaliated against.

The June 2008 that they very selectively cite from here, when they talk about females dropping off as they rose in the ranks, the letter itself says in convertible sales. She defined it herself that way. The case law is very clear.

Similarly situated means people who are under the same supervision and who are similar in terms of the circumstances of their employment. That's all she ever meant, if she meant anything by that line.

So we believe that there is -- the case law in the Second Circuit, as your Honor knows, says you have to look at the facts, and even if you go beyond the charge, which has this one vague line in it at the end of this long --

THE COURT: There is a great difference between the pleading requirements in this context and what you would have in a lawsuit. The question is whether there is enough to put Goldman Sachs and the EEOC on notice.

MS. BROWN: Exactly.

THE COURT: That is a different standard than you would have if this were a contract claim.

MS. BROWN: Well, true, your Honor. But the courts have been very clear that you have to look at, when there is no EEOC investigation you look at the language of the charge. Obviously here there is nothing there except this very vague phrase at the end of a long individual charge.

Here we had an investigation. So we know what the EEOC looked at, and what they looked at and what she told the EEOC to look at was convertible bonds, and then this group that she was going to join. Goldman Sachs would have had no notice whatsoever that she was talking about anything but her

departments and the places where she had worked.

The people she compared herself to, if we look in that June 2008 letter, the people that she is talking about who were supposedly similarly situated were two men who worked with her in her department. And the list of women that were supposedly similarly situated were in her department.

She is saying, my peers are people similarly situated or the women in the convertible bonds department. There was never a request for information about all the women on other desks or about the equities section of the firm or even about the securities division of the firm, never mind the whole firm.

The only thing that was ever asked for and looked into, if we are talking about the actual investigation, not a stray comment that she may have made to the agency, the only thing that was looked into was that set of people in convertible bonds. Then they asked at the end about research sales, which is where she was supposed to go.

But that seems to me, your Honor, conclusive that this investigation was confined to those groups, and it never ever got any broader than that. Goldman Sachs never had any notice of anything broader.

Of course it didn't see most of this information at the time anyway. But even if you look at what was conveyed to the agency, every communication from her and from her counsel is convertible bonds.

THE COURT: All right. What else do you want to tell me?

MS. BROWN: Would you like to hear from plaintiff's counsel on that?

THE COURT: Excuse me.

MS. BROWN: Would you like to hear from plaintiff's counsel on that issue?

THE COURT: Yes.

MS. BROWN: Let's do that, your Honor. If I may, we will argue the other aspects of the motions separately.

MR. KLEIN: Thank you, your Honor.

A couple of framing points about this discussion. One, the original class charge was filed on behalf of Christina Chen-Oster relating to her own individual Title VII claim and also to alert the EEOC of a class action allegation using the words similarly situated women.

There are distinct issues, one relating to the individual circumstances surrounding Ms. Chen-Oster's individual Title VII claim, the other relating to a broader class allegation that was filed in June of 2005. The purpose of that is to alert the EEOC that the issues that are identified in the charge relate not just to Ms. Chen-Oster's individual claim but that of a larger class, of similarly situated women. The inquiry can't at that point, what effort or what investigation arose during the many years the EEOC had

the charge and was actively investigating it, just to make the point, this would create an endless quagmire. In essence, the EEOC investigator would become a fact witness. You would have to ask them what their state of mind was in terms of their investigation, what information they obtained, what other charges existed for the entire national inventory. Were there other similar charges filed in your San Francisco office and elsewhere.

It would create essentially a second collateral litigation not relating to the particulars of Chen-Oster's individual claim, but the constellation of information the EEOC could have obtained or did obtain over the some five years from the time that the charge was filed to the time the notice of right to sue was finally issued. Strikingly, that is not the standard under controlling Second Circuit authority. The Tolliver v. Xerox decision makes it clear that if there is information that would alert the EEOC -- alert the EEOC, not defendant -- alert the EEOC that there are broader issues implicated by the class charge, that is sufficient to exhaust.

In essence, what the defendant is arguing is that back in June of 2005, six years before the case was filed, or five years, Ms. Chen-Oster should have known the proper class definition of the complaint that would ultimately be filed in federal court.

That is an impossible standard. It would essentially

require everyone to essentially elaborate on a class charge, the four corners of the eventual complaint that is filed years later.

THE COURT: The purpose of informing the EEOC, not the defendant of the scope of the charge, do you want to elaborate what the purpose of that is?

MR. KLEIN: Yes, your Honor.

Judge Francis cited to a number of decisions that speak to that issue in his decision. He cites to the Second Circuit has held that the EEOC charge need not specify that the claimant purports to represent a class or others similarly situated as long as it alerts the EEOC that more is alleged than an isolated act of discrimination --

THE COURT: What are you reading from?

MR. KLEIN: This is Magistrate Francis' decision on this issue that is now the subject of the objection. He elaborates quite clearly that Second Circuit authority concludes that the question is whether the EEOC was alerted to the issues and whether conciliation could take place.

But this is a concept in a vacuum in a way. The reality is that many times the EEOC doesn't do an investigation. There was no conciliation because there was never a cause determination made by the EEOC. We don't know what the eventual outcome would have been of this investigation. It's likely probable that in evaluating

compensation and promotion information that the defendant never provided to the EEOC they would have concluded that there was a broad claim that could be brought not just with respect to Ms. Chen-Oster in her own individual circumstances but relating to the entire company in terms of gender discrimination. It's a hypothetical. We don't know the answer to that.

But the standard itself speaks to this question of conciliation between the EEOC and the defendant. That didn't happen here, because there was never a point where the EEOC made a determination. We don't know what they were thinking. Ms. Brown points out that they requested information. We don't know if it was provided.

There is nothing in the record on that point. We don't know if there are other charging parties that filed similar claims. We don't know whether there was other independent information or other agencies that would have provided additional information or insight into the scope of the class.

What we have is a charge of discrimination filed in 2005 that outlines the individual circumstances and claims of Ms. Chen-Oster and also categorically states that it is on behalf of similarly situated women, which under Second Circuit authority is sufficient to put the EEOC on notice that the scope of the charge doesn't just relate to Ms. Chen-Oster but relates to a class of women. At that point there is no

investigation, there is no way to know necessarily what the scope would be.

The defendant seizes on the fact that Ms. Chen-Oster was focusing on her own individual claims in terms of the EEOC investigation and ignores the fact that there is language in the charge that clearly identifies a class claim, and that is sufficient under Second Circuit authority.

THE COURT: All right. I think Ms. Brown was in mid argument.

MS. BROWN: Just a few brief points, your Honor.

Mr. Klein was representing Ms. Chen-Oster. He allowed this to sit at the EEOC for five years before asking for a right to sue. They did an investigation in this case. It's not hypothetical what they were looking for. The reason it didn't go any broader than convertible sales is because they and their client never raised anything broader than that.

So what he is doing now, he never mentions convertible sales, he's running away from the whole investigation. What he's saying is that one little line in the charge is enough to put the defendant on notice of a nationwide class of all revenue professionals. He slurred right over --

THE COURT: It is a serious line. It isn't a casual line. I am sure anybody reading her charge would be aware of her language with respect to others similarly situated and that the suit is being brought on their behalf as well. That is

explicitly in what she submitted to the EEOC.

MS. BROWN: Yes, your Honor.

But two things: First, we have to define similarly situated. When we look at the case law that Mr. Klein was citing, it says there are two purposes to this charge. It has to alert the EEOC, but it has to provide sufficient notice to the employer to explore conciliation with the affected group. There is no definition in this of who the affected group is. How do we figure that out now? We look at case law about similarly situated --

THE COURT: There is language in her charge suggesting it is a widespread practice, is there not? How the women drop off and how the --

MS. BROWN: But women that she's referring to when she writes to the agency are only the ones in her group. Since there was an investigation here, all this hypothesizing about contacting other agencies and so forth doesn't make any sense. This is what the agency read her phrase similarly situated to mean. The women who were not promoted were in convertible bonds.

THE COURT: The agency --

MS. BROWN: Because they -- excuse me. I don't want to interrupt you, your Honor.

THE COURT: Well, I don't understand your last statement that the agency understood her to mean.

MS. BROWN: The EEOC understood similarly situated to mean convertible bonds, because the women who she says weren't promoted in the list she gave them were all in convertible bonds. So they asked Goldman Sachs to explain all of these facts that I read you from the letter that, the investigative request that the EEOC sent to Goldman Sachs was about the women in convertible bonds. Those were the items in their two information requests to Goldman Sachs, which were the ones behind tab D and tab H. Those were how they defined similarly situated. So the notice to the agency was, if there are similarly situated women, here's who they are.

It's not just the agency. We can see about her thinking because what she told the agency to ask for was just the people in the groups where she had worked. So we have here a definition of similarly situated that is confined to those groups. That's the only reasonable that to say that the notice to the EEOC and Goldman Sachs consisted of. It never consisted of anything broader than that. So that's how the two entities that are critical to this question of notice read that charge.

The EEOC in its information requests over years, never broader than those groups, and Goldman Sachs never responded, of course, to anything broader than those groups and would have had no reason to think she was pursuing this on behalf of anyone else.

Under the case law the combination of the vague phrase

in the charge and the definition that was given to it by the two entities where the policies --

THE COURT: What are you referring to when you say the vague phrase.

MS. BROWN: Similarly situated. I mean that phrase isn't defined. So we look to how the EEOC and Goldman Sachs defined it, because those are the entities that had to have notice of what she was claiming and adequate notice of the group that was affected so that they would reasonably conciliate. Goldman Sachs would have had no idea from this charge and this investigation that every professional in the firm was a group that they had to focus on based on this charge. It just never, never is in the record, and they concede it basically.

MR. KLEIN: May I respond briefly.

THE COURT: Are you finished?

MS. BROWN: Yes, your Honor.

THE COURT: Yes.

MR. KLEIN: The problem with Ms. Brown's argument is that it's complete conjecture. We don't know what the EEOC investigation is. There is nothing in the record from the EEOC. What we have, what Ms. Brown cites are to requests for information that to my knowledge they never responded to. Moreover, they are focusing --

THE COURT: Requests to whom?

MR. KLEIN: The EEOC submitted requests for information to Goldman Sachs relating to Ms. Chen-Oster's individual claim. We don't know what happened. What we have in the record are letters going back and forth. But that isn't the scope of the investigation. Nor do we know what the EEOC's intent was in terms of investigating it, because they never concluded the investigation.

There was no conciliation because there was never a cause determination. And, critically, Ms. Brown focuses on Ms. Chen-Oster's charge, but there may have been, in fact, likely were other charges during the same time frame that related to the same types of information.

In candor, the EEOC took too long, was inadequately prepared to deal with the issues, the investigation rather relating to those charges and ultimately did not issue a cause determination after five years.

Now Ms. Brown is using that as a form of judo, if you like, to essentially say to us too bad. The EEOC didn't do their job. Now you are stuck with whatever investigation we think we can surmise from a very limited record.

I would submit to your Honor if that is the actual inquiry, and we say it isn't and I think the case law is clear on that, where is the evidence that would support that? There is no one here, there is nothing in the record from the EEOC on this. Again, to make a more general point, this would create a

literal quagmire. In essence, every time there is a class action under Title VII, part of the record would be an exhaustive development of the fact record in terms of the scope of the EEOC investigation.

To make the point, my client, Ms. Chen-Oster, was interviewed by the EEOC investigator. That is not in the record. We don't know what else the investigators did in furtherance of this investigation. What we have are snippets. That is not enough of a record to make any kind of sense out of and certainly not a grounds to deny the right to bring a class action when the charge itself was explicit, that it was filed on behalf of other similarly situated women.

THE COURT: OK.

MS. BROWN: Your Honor, I hate to prolong this, but I think this is pure sophistry here. The question is what did Ms. Chen-Oster mean when she said similarly situated in the charge. That is a matter of looking at what she and her counsel told the agency it meant.

In those letters that the agency accepted and gave notice of to Goldman Sachs, she said, My peers are the women in the convertible bonds department. She said the similarly situated men, using that word, who got paid more than I did were my two colleagues in convertible bonds. We don't have to get into a quagmire here.

THE COURT: Is there not other language about how the

women drop out and --

MS. BROWN: Your Honor, let's look at that women drop out. It is a reference to the women in convertible bonds. When she talks about the women dropping off and not being promoted, it is a reference to convertible bonds. She is not talking anything broader than that. Here we go, the letter under tab G.

She talks about females dropped off as they rose in rank. Then she says, she goes on and talks about analysts to VP. This data demonstrates there were three point five times hired or promoted to VP than women during this period within the convertible bond sales groups. And the men had 40 percent more time at the firm.

THE COURT: Then look at the next sentence.

MS. BROWN: Yes.

THE COURT: All the men were employed approximately 40 percent more time at the firm.

MS. BROWN: Right. Those are the men in the convertible bonds department who had more experience at the firm. Then she goes over in the next one about routine promotions. She goes right into the seven female VPs in convertible bonds, the 24 male VPs, and she references there they have eight-year greater employment, and the women had more than these years of tenure. She is talking all about that group of people.

The headings may be what they are, but the facts -- which is what we are looking at here, what did she tell the agency this group was -- she said right there on the next page, We should define my peers as all convertible salespeople both in London as well as in the U.S. How can we say that the EEOC or Goldman Sachs were put on notice of a definition different from what she herself said. That is the scope of the similarly situated group here. Thank you.

MR. KLEIN: 30 seconds, your Honor. I don't mean to prolong this, but I just --

THE COURT: I am looking at the clock. 30 seconds.

MR. KLEIN: I appreciate the indulgence. Just to make the point, if you look at the same document, your Honor pointed it out, it speaks to the general issue of a large class of similarly situated women, "Females drop off as they rose in ranks. Men are routinely promoted over women who had comparable or greater experience. Fewer female VPs remain at Goldman."

There are general statements, and then specific illustrations borne by Ms. Chen-Oster's personal experience, which is exactly what you would expect, that the charging party would focus on her own individual circumstance to illustrate a large point.

Thank you, your Honor.

THE COURT: I am going to reserve decision. I

appreciate it if counsel would order the transcript of this argument.

Decision is reserved.

MS. BROWN: Thank you, your Honor.

May it please the Court, we have another motion before your Honor.

THE COURT: What is the other motion?

MS. BROWN: Your Honor, the other motion is our motion to strike the class allegations in the complaint based on the Wal-Mart v. Dukes case.

THE COURT: Right.

MS. BROWN: And to grant summary judgment on the disparate impact claims, because nowhere in the charges are the facts that would challenge a neutral practice.

THE COURT: Have you made that as a formal motion?

MS. BROWN: Yes, your Honor. It's been on file since the summer.

THE COURT: It has since the summer. You want to argue it now?

MS. BROWN: Well, if your Honor has not read the pleadings or isn't prepared for it, I would request your indulgence to argue it another day.

THE COURT: Yes.

MS. BROWN: It is a very important motion in our view.

THE COURT: All right. It's been fully submitted how

long?

MS. BROWN: It's been fully submitted, your Honor, I believe it was August, the last brief. Let me just check.

October 11, your Honor. Time flies fast, but, yes, October 11 was the reply brief in support of our motion.

THE COURT: We will set it down for argument sometime in the near future.

MS. BROWN: Thank you very much.

MR. KLEIN: Thank you, your Honor.

THE COURT: I think what happened is it's probably in a file which is headed Chen-Oster, etc.

(Adjourned)